PRB-1 (1999)

Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures

Order (RM-8763, DA 99-2569)
Adopted November 18, 1999; Released November 19, 1999

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service.	)	RM-8763

ORDER

Adopted: November 18, 1999 Released: November 19, 1999

By the Deputy Chief, Wireless Telecommunications Bureau:

I. Introduction and Executive Summary

1. In this Order, we address a Petition for Rule Making (Petition), filed on February 7, 1996, by The American Radio Relay League, Inc. (ARRL or Petitioner), asking that the Commission review and modify its policies and procedures pertaining to the Commission's limited preemption of state and local regulations affecting amateur radio facilities. The Petitioner also requests that the Commission amend Section 97.15 of the Commission's Rules to clarify the Commission's preemptive intent with respect to such state and local regulations. We have carefully reviewed the requests, and the supporting arguments, and conclude that the modifications and clarifications suggested by Petitioner would not serve the public interest, convenience and necessity. Therefore, the Petition is denied.

II. Background

2. In 1984, ARRL petitioned the Commission for a declaratory ruling that would limit local regulatory control of amateur stations. It was believed that local building codes and zoning regulations had limited the communications ability of licensees in the amateur service. An outdoor antenna is a necessary component for most types of amateur service communications. Municipalities and local land use regulatory authorities regulated the heights, placement and dimensions of antennas. In PRB-1, resolving the ARRL's declaratory ruling petition, the Commission noted that these regulations often result in conflict because the effectiveness of the communications that emanate from an amateur radio station is directly dependent upon the location and the height of the antenna. Consequently in PRB-1, the Commission enunciated the Federal policy toward state and local regulatory restrictions on amateur station facilities.

3. In the MO&O, the Commission declared a limited preemption of state and local regulations governing amateur station facilities, including antennas and support structures. The Commission determined that there was a strong Federal interest in promoting amateur service communications, and that state and local regulations that preclude amateur service communications are in direct conflict with Federal objectives and must be preempted. Furthermore, the Commission stated that a local ordinance or zoning regulation must make reasonable accommodation for amateur communications and must constitute the minimum practicable regulation to accomplish the local authority's legitimate purpose. However, the Commission did not extend the limited preemption to covenants, conditions and restrictions (CC&Rs) in deeds and in condominium by-laws because they are contractual agreements between private parties. Petitioner, inter alia, requests the extension of the limited preemption to such CC&Rs.

4. Petitioner also requests other clarifications to PRB-1, as follows: (a) that local governments must make a reasonable accommodation for amateur radio antennas, rather than balancing their own local interests against the Federal interest in amateur radio; (b) that local governments could not specify a lower height maximum than sixty to seventy feet for an amateur radio antennna structure; (c) that overly burdensome conditions in land use authorizations or imposition of excessive costs is preempted; (d) that denial of a particular use permit or special exception does not relieve a local government from having to make a reasonable accommodation for amateur communications; (e) that conditional use permit procedures can be used to regulate amateur radio antennas, but only as an adjunct to a reasonable height restriction; and, (f) that land use restrictions pertaining to safety that limit the overall height of an amateur radio antenna structure, or restrict installation of an antenna altogether, are invalid unless there is no other alternative available that is less burdensome and still accomplishes the same purpose. The Commission sought comment on the Petition on February 21, 1996.

5. Since the adoption of the Commission's limited premption policy in PRB-1, Congress enacted Section 704 of the Telecommunications Act of 1996, concerning the siting of personal wireless service facilities. We note that Section 704 of the Telecom Act encompasses commercial mobile radio services, unlicensed wireless services and common carrier wireless exchange access services. Thus, Section 704 of the Telecom Act, which, among other things, bars state or local regulations that prohibit or have the effect of prohibiting the provision of personal wireless services, does not apply to stations or facilities in the amateur radio service.

III. Discussion

6. The Commission's policy with respect to restrictive covenants is clearly stated in the MO&O establishing a limited preemption of state and local regulations. In the MO&O, the Commission stated that PRB-1 does not reach restrictive covenants in private contractual agreements. The Petitioner argues that enforcement of a covenant by the court constitutes "state action", thus converting what otherwise would be a private matter into a matter of state regulation and, thus, subject to the Commission's limited preemption policy. Notwithstanding the clear policy statement that was set forth in PRB-1 excluding restrictive covenants in private contractual agreements as being outside the reach of our limited preemption, we nevertheless strongly encourage associations of homeowners and private contracting parties to follow the principle of reasonable accommodation and to apply it to any and all instances of amateur service communications where they may be involved. Although we do not hesitate to offer such encouragement, we are not persuaded by the Petition or the comments in support thereof that specific rule provisions bringing the private restrictive covenants within the ambit of PRB-1 are necessary or appropriate at this time. Having reached this conclusion, we need not resolve the issue of whether, or under what circumstances, judicial enforcement of private covenants would constitute "state action."

7. Petitioner further requests a clarification of PRB-1 that local authorities must not engage in balancing their enactments against the interest that the Federal Government has in amateur radio, but rather must reasonably accommodate amateur communications. We do not believe a clarification is necessary because the PRB-1 decision precisely stated the principle of "reasonable accommodation". In PRB-1, the Commission stated: "Nevertheless, local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose." Given this express Commission language, it is clear that a "balancing of interests" approach is not appropriate in this context.

8. Petitioner also requests establishment of sixty or seventy feet as the minimum height in a metropolitan area for an amateur antenna structure so that local authorities could not specify a lower height maximum for an amateur antenna. Petitioner argues that such a minimum height would minimize interaction between amateur stations and home electronic equipment and provide reasonable antenna efficiency at different amateur frequencies, MF through UHF and beyond. Petitioner also contends that structures of that height and above can be so located as to minimize the visual impact, and that retractable antennas could be used to address unusual aesthetic situations, such as in historic or scenic zones. We do not believe that it would be prudent or that it is appropriate to set such a standard for amateur antennas and their supporting structures because of varying circumstances that may occur when a particular antenna configuration is under consideration, such as terrain or man-made obstructions. We believe that the policy enunciated in PRB-1 is sound. PRB-1 did not specify a particular height limitation below which a local government may not regulate. The Commission did not want to mandate specific provisions that a local authority must include in a zoning ordinance. We continue to believe that the standards the Commission set, that is, "reasonable accommodation" and "minimum practicable regulation", have worked relatively well. Therefore, we are not persuaded that changes to the Commission's policy of leaving the specifics of zoning regulations to the local authority, including provisions concerning the height of an amateur antenna, are necessary at this time.

9. Petitioner further requests that the Commission specifically preempt overly burdensome conditions and excessive costs levied by a local authority in connection with engineering certifications or issuance of antenna permits. Specifically, Petitioner argues that assessment of unusual costs for processing an antenna permit application cannot be used by the local authority as a means of indirectly prohibiting the antenna. Petitioner states that the same argument is true of conditional use permits that require an amateur antenna to be screened from view by the installation of mature vegetation. According to the ARRL, if full vegetative screening cannot be accomplished in a cost-effective manner, a condition requiring such screening is a de facto prohibition. Although Petitioner concedes that a municipality may require amateur operators to pay reasonable expenses to obtain amateur permits, the Petitioner objects to the imposition of unreasonable expenses because such expenses would discourage or prohibit the installation of amateur antennas. Petitioner also requests that the Commission declare as invalid certain land use restrictions based on safety considerations, such as setbacks on the property where the antenna is to be erected, unless there are no other alternatives that would accomplish the same purpose. Finally, Petitioner requests that the Commission specify that, if a local authority denies a conditional use permit or a special exception request, it still has the obligation to make a reasonable accommodation for amateur communications. We return once again to the position that we have stated earlier in this Order, that is, that the standards of "reasonable accommodation" and "minimum practicable regulation" are sufficiently efficacious as guideposts for state, local and municipal authorities. We believe that the effectiveness of these guidelines or standards can be gauged by the fact that a local zoning authority would recognize at the outset, when crafting zoning regulations, the potential impact that high antenna towers in heavily-populated urban or suburban locales could have and, thus, would draft their regulations accordingly. In addition, we believe that PRB-1's guidelines brings to a local zoning board's awareness that the very least regulation necessary for the welfare of the community must be the aim of its regulations so that such regulations will not impinge on the needs of amateur operators to engage in amateur communications.

IV. Conclusion

10. In our view, Petitioner has not demonstrated that the clarifications requested are necessary. Accordingly, we conclude that the public interest would best be served by denying the ARRL

request for modification and clarification of Commission policies and procedures concerning the limited preemption of state and local regulations that affect amateur service radio facilities.

V. Ordering Clause

11. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. SS 154(i) and 303(r), the petition for rule making, RM-8763, filed by The American Radio Relay League, Inc. on February 7, 1996, IS HEREBY DENIED. This action is taken under the delegated authority contained in Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. SS 0.131 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen O'Brien Ham

Deputy Chief, Wireless Telecommunications Bureau

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